Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
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Inquiry Concerning the Deployment of	)	
Advanced Telecommunications Capability	)	
to All Americans in a Reasonable and	)	GN Docket No. 04-54
Timely Fashion, and Possible Steps to	)	
Accelerate Such Deployment Pursuant to	)	
Section 706 of the Telecommunications	)	
Act of 1996	)	

REPLY COMMENTS OF
THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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The National Cable & Telecommunications Association ("NCTA"), by its attorneys, submits the following Reply Comments in response to comments submitted in the above-captioned proceeding.

I. THE RECORD DEMONSTRATES THE INCREASINGLY COMPETITIVE CONDITIONS IN WHICH CABLE SYSTEMS OFFER BROADBAND SERVICES

In it comments, NCTA presented ample evidence that the pace of broadband deployment more than satisfies the Section 706 "reasonable and timely" standard.[1] Our comments pointed out that "in an environment that is notably characterized by the absence of constraining regulation – and by increasingly vibrant competition – availability of broadband service has become ubiquitous, and the quality of such service continues to be upgraded and improved."[2]

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[1] Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, FCC 04-55, rel. Mar.17, 2004, at ¶ 15 ("Notice").

[2] NCTA Comments, May 10, 2004, at 2.

NCTA buttressed its analysis with data that demonstrate the unstoppable trend in the direction of widespread broadband deployment and competitive choice. The cable industry expects that by the end of this year, cable modem service will be available to more than 90 percent of the industry's video service area. And local telephone companies, despite their late start, have made great strides in offering their customers a broadband option. It is particularly noteworthy that broadband capability is increasingly available in less densely populated areas. Broadband Internet is one of the great success stories of the 1996 Telecommunications Act.

But the success of broadband Internet as a widely available, increasingly capable, and diversely sourced service is still evolving. Many cable companies, for example, are offering subscribers speeds of 3 Mbps, well beyond the FCC-established 200 kbps standard. At these speeds, residential customers will be able to take advantage of existing and still-to-be-developed applications that will provide enhanced opportunities for learning, leisure and work at diverse locations. Residential broadband customers can look forward to these offerings not only from cable and local telephone companies, but also from a growing array of new entrants, including electric utilities, satellite companies, and wireless companies.

A. The Comments of Parties Who Characterize Residential Broadband as a Duopoly Warranting Regulation Are Misplaced

When contrasted with comments parties who are actively deploying broadband and those of near-term new facilities-based providers, the comments of parties seeking Commission sanction for access to the underlying facilities of providers comes across as anachronistic.[3] When there was only one means by which MCI and AT&T, and their customers, could obtain access to end-users for their long distance services, it was necessary for the Commission to establish and enforce regulations that guaranteed long distance carriers local access and

facilitated choice for consumers. The Commission should explicitly acknowledge changed circumstances. In particular, legacy regulations of a monopoly era should not be implemented to reward the very companies that have chosen *not* to invest in the provision of facilities-based broadband alternatives. For instance, the Commission should explicitly reject AT&T's suggestion that "[d]uopoly competition is problematic because *both* firms are likely to have the incentive and ability to maintain prices above competitive levels."[4]

First, no evidence is presented to support this claim of "problematic" competition. The fact is, there are two widely available broadband platforms today because cable companies took the necessary business risks, and once consumer demand for broadband was established, local telephone companies followed suit; now competition is fierce between the two industries. Second, many parties, including MCI and AT&T, recognize that other facilities-based broadband providers are at various stages of development and deployment, and that these new entrants will provide consumers with even more facilities-based broadband choices.[5]

Nevertheless, MCI in particular promotes special arrangements for non-facilities based entities.[6] The Commission should reject short-term regulatory actions designed to assist parties that have chosen not to invest in competitive broadband facilities, because any such actions will tend to inhibit the development of additional facilities-based competition.

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3 *See e.g.*, Comments of AT&T at 8-9 ("AT&T"); Comments of MCI at 12-13 ("MCI").

4 AT&T at 9.

5 *See* MCI at 9; AT&T at 9.

6 MCI at 12-13.

B. Facilities-Based Broadband Alternatives Are Steadily Increasing

As noted, in addition to cable and DSL, other residential facilities-based providers are offering broadband services, or are at various stages of developing plans to do so. There are at least *four* distribution mechanisms involving numerous providers, in addition to cable and DSL – licensed wireless, Broadband over Power Line, satellite delivery and unlicensed wireless services – which may compete directly with cable and DSL over the near term. Commission actions, and the announced plans of prospective new entrants, are well on the way to making further facilities-based broadband competition a reality.

1. Licensed Wireless Services

Comcast points out that "[t]he evolution of wireless services from analog cellular to digital Personal Communications Service ("PCS") to a new "third generation" ("3G") of services creates the potential for a vast expansion of high-speed services."[7] Verizon Wireless has announced plans to expand "… its Broadband Access service to cover one-third of its network by the end of this year … and every metropolitan area in the Nation by year-end 2005."[8] Other licensed wireless providers, while not as far along as Verizon, are also laying plans for widespread broadband deployment.[9]

2. Broadband over Power Line

The Commission's Broadband over Power Line ("BPL") initiatives[10] have prompted BPL providers to make clear their intent to offer service. According to the BPL industry's representative, the United Power Line Council ("UPLC"):

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[7] Comments of Comcast Corp. at 9.

[8] *Id.* at 9-10 (citation omitted).

[9] *Id.* at 10-11.

[10] *See Inquiry Regarding Carrier Current Systems, including Broadband over Power Line Systems,* Notice of Inquiry, 18 FCC Rcd 8498 (2003); Notice of Proposed Rulemaking, FCC 04-29, rel. Feb. 23, 2004.

> Already BPL is capable of providing symmetrical speeds in excess of 3 Mbps, and 'next generation' chipsets enabling up to 100 Mbps net user throughputs are currently being developed to enable BPL to offer real-time digital video and other high bandwidth applications by late 2005 or early 2006. Moreover, BPL is 'plug and play,' and enables home networking for consumers. As such, BPL is a nascent technology that holds great promise for both commercial and utility applications that will enable consumers in areas that are underserved and unserved by other broadband access technologies.[11]

The prospect that BPL will provide genuine facilities-based broadband competition is further supported by Current Communications Group ("Current"), a provider of BPL technology and services to end users, which similarly relates plans of electric utilities to deliver broadband competition.

> The BPL industry expects to play a significant role in the competitive delivery of advanced telecommunications capabilities and services to consumers nationwide. In areas served by DSL or cable modem, BPL will increase competition. Where consumers have no broadband choices today, BPL may prove to be one of the only avenues to purchase advanced services. Because of the ubiquity of power lines, BPL can deliver broadband service where other technologies cannot.[12]

UPLC and Current provide evidence that BPL will be an increasingly important broadband player in the coming years.

3. Satellite-Delivered Broadband Services

Cable companies and providers of DSL are also expected to face facilities-based broadband competition from satellite-based systems. EchoStar contends, once deployed, broadband capable

> [s]atellite systems will offer instantaneous competition in the significant number of areas that have only one broadband provider, allowing people in those areas to enjoy the many benefits of having freedom to choose among broadband providers. And just as important, in areas that do have more than one service provider, satellite broadband systems will provide an added competitive jolt to markets now dominated by incumbent cable and telephone companies.[13]

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[11] Comments of the United Power Line Council at 4-5 (citations omitted).

[12] Comments of Current Communications Group, LLC at 3 (citation omitted).

[13] Comments of EchoStar Satellite LLC at 5 ("EchoStar").

EchoStar identifies several hurdles yet to be overcome before satellite-based providers become full-fledged competitors.[14] While NCTA believes the overcoming of these hurdles must not be accomplished at the expense of the legitimate spectrum needs of existing users,[15] the prospects for satellite broadband service seem encouraging.

4. Unlicensed Wireless Broadband Services

Several parties point out that unlicensed broadband wireless spectrum will provide an additional source of competition. Comcast observes that Wi-Max networks, which are expected to have a range of approximately 30 miles and data-transfer speeds of up to 70 Mbps, are being embraced by the leading chip maker, and will be available to mobile as well as fixed users.[16] The Wireless Communications Association International, Inc. ("WCA") observes that "it is possible to deliver wireless broadband service in a variety of frequency bands,"[17] but contends that the "MDS and ITFS spectrum in the 2.5 GHz band is optimally suited for [wireless broadband] delivery."[18] And the Commission recently proposed "to allow unlicensed devices to operate in the broadcast television spectrum at locations where the spectrum is not in use by television stations."[19] These initiatives demonstrate that wireless broadband, in its many forms, is well-positioned to become an important broadband player.

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[14] EchoStar at 6.

[15] For example, it is not clear, despite EchoStar's suggestion to the contrary, *see id.* at 7-8, that the use of CARS band spectrum by broadband satellite services will not disrupt existing operations.

[16] Comcast at 12 (citations omitted).

[17] Comments of the Wireless Communications Association International, Inc., May 10, 2004, at 2.

[18] *Id.*

[19] "FCC Proposes Rules to Facilitate Wireless Broadband Services Using Vacant TV Channels," FCC News Release, May 13, 2004, at 1.

II. THE COMMISSION IS RIGHT TO MONITOR AND LIMIT THE IMPOSITION OF REGULATIONS AND FEES ON THE PROVISION OF HIGH-SPEED INTERNET SERVICE.

Several organizations representing local governments contend that municipal franchising requirements and franchise fees should not be viewed as impediments to the deployment and provision of high speed Internet service.[20] This, they argue, is true even when the amount of franchise fees is completely untethered from the costs of regulating the use of public rights-of-way. And, according to the local governments, the Commission would have no authority to preempt the imposition of such fees, even if they were excessive and interfered with the provision of service.

None of these sweeping assertions are true. As the initial comments in this proceeding have illustrated, high speed Internet service is now available to most of the nation, but the percentage of households choosing to purchase such service is still relatively low. In these circumstances, it is hard to imagine how the imposition of regulatory costs and fees – which would increase the price – would not have an adverse effect on the penetration rate of the service. President Bush recently emphasized the importance of not taxing broadband so that it will be "affordable" and "spread to all corners of the country."[21]

Moreover, the local governments suggest that they have clear statutory authority to impose franchise requirements and unlimited franchise fees on high-speed Internet services, and that the Commission has no authority to preempt such requirements and fees. The statute does not compel this conclusion. Indeed, several courts have reached directly opposite conclusions.

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[20] *See* Comments of United States Conference of Mayors, et al.; Comments of NATOA and Alliance for Community Media.

[21] Remarks by the President at American Association of Community Colleges Annual Convention, Minneapolis Convention Center, Minneapolis, Minnesota, Apr. 26, 2004.

The cities point primarily to Section 253 of the Communications Act, which was added by the Telecommunications Act of 1996, as their protection against federal preemption. Section 253, captioned "Removal of Barriers to Entry," is primarily a *prohibition* against certain state or local regulation. Thus, section 253(a) provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." Section 253(c) carves out from this general prohibition a limited safe harbor for state and local regulation: "Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation is publicly disclosed by such government." And Section 253(d) specifically authorizes the Commission to preempt any state or local regulation or requirement that violates the prohibition of Section 253(a).

As the local governments point out, the only prohibition in Section 253 is the prohibition contained in Section 253(a). Only those state and local restrictions that prohibit or have the effect of prohibiting the ability of an entity to provide telecommunications services are barred. As noted by the United States Court of Appeals for the Eleventh Circuit, in language approvingly cited by the local governments, "it is clear that [subsections] (b) and (c) are exceptions to (a), rather than separate limitations on state and local authority in addition to those in (a)."[22]

The local governments suggest that this means that local franchise requirements and fees for telecommunications services may, in many instances, not even implicate Section 253 or need

[22] *BellSouth Telecommunications, Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1188 (11th Cir. 2001).

to be saved by the exceptions in subsection (c). But several courts have held to the contrary. For example, in *Bell Atlantic-Maryland, Inc. v. Prince George's County*, the court found that "any 'process for entry' that imposes burdensome requirements on telecommunications companies and vests significant discretion in local governmental decision makers to grant or deny permission to use the public rights-of-way 'may . . . have the effect of prohibiting' the provision of telecommunications services."[23] Similarly, in *AT&T Communications of the Southwest, Inc. v. City of Dallas*, the court found that requiring a franchise as a precondition of providing telecommunications service is "sufficient proof of the requisite prohibitive effect that triggers the preemptive force of § 253(a)."[24]

These decisions do not mean that all franchise requirements and fees imposed as a condition to providing telecommunications service are prohibited. But what they indicate is that, to survive the prohibition of Section 253(a), virtually all such requirements and fees must fall within the exceptions of Section 253(c).

With respect to rights-of-way management, passing this test with respect to the provision of any new telecommunications services by cable operators will be difficult if not impossible. This is because cable operators already have authority, pursuant to Section 621 of the Communications Act, to occupy and use public rights-of-way as a result of having obtained cable franchises. And local governments already have authority under Title VI to manage the use of rights-of-way by such cable operators. There is no reason to believe that the provision of additional non-cable services over cable facilities in those same rights-of-way imposes any

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[23] 49 F. Supp. 2d 805, 814 (D. Md. 1999), *vacated and remanded for consid. of state law issues*, 212 F.3d 863 (4th Cir. 2000).

[24] 52 F. Supp. 2d 763, 770 (N.D. Tex. 1999), *vacated as moot*, 243 F.3d 928 (5th Cir. 2001). *See also N.J. Payphone Ass'n v. Town of West New York*, 130 F. Supp. 2d 631, 637 (D.N.J. 2001). *See generally* G. Gillespie,

additional burdens that require any additional regulation by local governments. Therefore, there is no reason to expect that additional franchise obligations are in any way necessary to enable local governments to manage their rights-of-way.

With respect to fees, the local governments lecture the Commission that Section 253(c) unquestionably permits the imposition of "rental" fees tied to gross revenues and unrelated to the costs of regulating and managing use of rights-of-way. But while some courts have agreed that this is the case,[25] several others have held directly to the contrary.[26]

As one commentator has noted,

> A number of courts have held that the fees must be limited to "the cost to the [municipality] of maintaining and improving the public rights-of-way that [the telecommunications provider] actually uses." These cases have rejected municipal fees that are based – as are most – on a percentage of the gross revenues of telecommunications providers. . . . In striking down fees, some courts have also held that fees recovering more than a municipality's costs cannot be "compensatory" within the meaning of section 253(c).[27]

"Rights-of-Way Redux: Municipal Fees on Telecommunications Companies and Cable Operators," 107 Dickinson L. Rev. 209, 231-235 (2002).

[25] *See T.C.G. Detroit v. City of Dearborn*, 16 F. Supp. 785, 789 (E.D. Mich. 1998), *aff'd*, 206 F.3d 618 (6th Cir. 2000); *T.C.G.N.Y., Inc. v. City of White Plains*, 125 F. Supp. 2d 81, 96 (S.D.N.Y. 2000), *aff'd in part and rev'd in part*, 305 F.3d 67 (2d Cir. 2002), *cert. denied*, 538 U.S. 923 (2003); *Qwest Corp. v. City of Portland*, 200 F. Supp. 2d 1250 (D. Or. 2002).

[26] *See*, *e.g.*, *Bell Atlantic-Maryland, Inc. v. Prince George's County*, *supra*, 49 F. Supp. at 818; *Qwest Communications Corp. v. City of Berkeley*, 146 F. Supp. 2d 1081, 1100 (N.D. Cal. 2001); *PECO Energy Co. v. Township of Haverford*, No. 99-4766, 1999 WL 1240941, at 7* (E.D. Pa. Dec. 20, 1999); *AT&T Communications of the Southwest, Inc. v. City of Dallas*, 8 F. Supp. 2d 582, 593 (N.D. Tex. 1998); *N.J. Payphone Ass'n v. Town of West New York*, *supra*, 130 F. Supp. 2d at 638.

[27] Gillespie, *supra*, 107 Dickinson L. Rev. at 235. As NCTA has previously shown, the franchise fees collected by local governments in connection with the provision of traditional cable service pursuant to their cable franchise agreements have skyrocketed in recent years without any concurrent increase in the burdens imposed on rights-of-way or on regulators:

> In 1985, one year after Congress enacted Section 622, the cable industry's total gross revenues from the operation of cable systems was $8.831 billion – which meant that cities were entitled to $441.5 million in franchise fees. In 1996, when Congress amended the franchise fee cap to exclude gross revenues from services other than cable services, gross revenues had more than tripled, so that cities were entitled to $1.385 *billion* in franchise fees. By 2001, this amount, *based solely on gross revenues from the provision of cable services and not including cable modem service revenues*, had skyrocketed to $2.183 billion.

NCTA Reply Comments, CS Docket No. 02-52, Aug. 6, 2002, at 27 (emphasis in original).

Finally, the local governments argue that even if a particular fee or franchise requirement does not qualify for the exceptions in Section 253(c), the Commission has no authority to preempt it. In their view,

> [s]hould credible evidence be presented to demonstrate that a state or local regulation has the effect of prohibiting the provision of telecommunications service, § 253(d) bars the FCC from considering whether a state or local right-of-way compensation or management technique is at issue. Congress reserved these issues exclusively to the courts. Subsection (d) gives the Commission authority to resolve only subsection (a) and (b) disputes, and *withholds* from the Commission authority over subsection (c) disputes.[28]

But subsection (d) does not preclude the Commission from acting to preempt franchise requirements and fees. As discussed above, subsection (c) does not itself prohibit anything; it is a savings clause that carves out exceptions to the prohibition of subsection (a). If a requirement or fee has the effect of preventing the provision of telecommunications service and does not qualify for the exceptions in subsection (c), it violates subsection (a). And subsection (d) specifically authorizes the Commission to preempt requirements and fees that violate subsection (a).

Accordingly, the Commission rightly asks the relevant question whether local government fees and regulation are impeding the deployment and availability of broadband services. Nothing in Section 253 immunizes such fees and regulation from preemption by the Commission.

In any event, Section 253 applies only to restrictions on the provision of *telecommunications* services. The Commission initially determined that cable modem service was an interstate *information* service that did not include a telecommunications service. Although the United States Court of Appeals for the Ninth Circuit has determined that cable

modem service does include the provision of a telecommunications service, that determination may yet be reviewed by the Supreme Court. Ultimately, cable modem service (and Voice over IP service) may be classified not as telecommunications services but as information services.

Nothing in Section 253 addresses the regulation of *information* services at all. Such regulation is neither specifically authorized nor exempted from Commission preemption. Were the Commission to determine that fees and franchise regulations imposed on interstate information services were incompatible with its statutory mandate under Section 706 to promote the deployment of advanced telecommunications services, it would have ample authority to preempt.

CONCLUSION

Deployment of advanced services represents one of the great success stories of the 1996 Telecommunications Act. In the course of implementing the Act, the Commission's policy of letting the marketplace work has resulted in rapid, widespread and competitive deployment of broadband. At the same time, the Commission has resisted efforts to regulate and tax the Internet, and it should do so again by rejecting calls by localities to permit burdensome fees that will inevitably impede deployment. Broadband policy has worked. The Commission should stay the course.

Respectfully submitted,

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[28] Comments of United States Conference of Mayors, et al. at 6.

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